91-1325

Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *ET AL.*,

Petitioners,

v.

NEW BECKLEY MINING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether substantially similar state and federal proceedings must be completely identical in claims asserted and relief sought before the proceedings are deemed "parallel" for purposes of the "*Colorado River*"[1] "abstention" doctrine.

2. Whether the existence of a civil RICO claim in a federal case automatically precludes a finding of exceptional circumstances warranting deference to an otherwise parallel state court case under the *"Colorado River"* doctrine.

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[1]*Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

PARTIES BELOW AND AFFILIATES OF PETITIONER

The Appellant in the decision below was New Beckley Mining Corporation, Inc.

The Appellees in the decision below were the International Union, United Mine Workers of America; Joe Carter; Ken Peterson; Virgil Pyatt; Larry Flint; Harvey Stover; Robert Burdette; Paul Daniels; George Bailey; Herman Stanley; Ronnie Scarbro; Robert Tyree; Ken Toler; Roger McKinney; and John Does.

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IN THE
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OCTOBER TERM, 1991

No. ____

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; JOE CARTER; KEN PETERSON; VIRGIL PYATT; LARRY FLINT; HARVEY STOVER; ROBERT BURDETTE; PAUL DANIELS; GEORGE BAILEY; HERMAN STANLEY; RONNIE SCARBRO; ROBERT TYREE; KEN TOLER; ROGER MCKINNEY; AND JOHN DOES,

Petitioners,

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NEW BECKLEY MINING CORPORATION,

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Petitioners, International Union, United Mine Workers of America; Joe Carter; Ken Peterson; Virgil Pyatt; Larry Flint; Harvey Stover; Robert Burdette; Paul Daniels; George Bailey; Herman Stanley; Ronnie Scarbro; Robert Tyree; Ken Toler; and Roger McKinney respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reported at 946 F.2d 1072 and is reproduced in the Appendix hereto at App. 1a. The decision of the United States District Court for the Southern District of West Virginia is unreported and is reproduced at App. 8a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 16, 1991. App. 1a. A timely petition for rehearing and suggestion for rehearing *en banc* was filed by the petitioners on October 30, 1991. The Court's order denying rehearing was entered on November 19, 1991 and is reproduced in the Appendix at App. 13a. This Petition is timely filed with this Court under 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The State Court Proceedings

This action, and a related parallel action in West Virginia state court, arose from a lawful strike by the members of the Petitioner Union who are employees of Respondent New Beckley Mining Corporation ("New Beckley"). The strike, which started on or about January 23, 1989, continued into 1991.[2]

On March 21, 1989, New Beckley filed an action in the Circuit Court of Raleigh County, West Virginia, against, *inter alia*, the International Union, United Mine Workers of America (the "International Union"). The Complaint sought to enjoin alleged acts of violence, unlawful picketing, coercion and intimidation purportedly connected with the strike at New Beckley. Additionally, the Complaint sought costs, attorney's fees, and "such other, further or general relief" as appropriate. The proceedings progressed in the Circuit Court of Raleigh County throughout the rest of 1989 and into 1990. The parties actively litigated the issues and the court was continuously monitoring and adjudicating the matters. The judge even personally inspected the mine area. The court also expressly warned the parties that it would, "upon proper proof," not hesitate to pursue both civil and criminal penalties against those responsible for illegal and tortious conduct. Also, the Supreme Court of West Virginia considered one of the Circuit Court's orders and issued a writ

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[2]New Beckley discontinued mining operations in 1990. However, the strike, and accompanying picketing, continued into 1991. The state and federal cases are not effected by New Beckley's cessation of operations.

of prohibition in this matter. *See Trumka v. Ashworth*, 395 S.E.2d 563 (W.Va. 1990). In February, 1991, both parties expressly requested the state court to continue supervising the strike situation. As of this date, the state court action is still pending.

B. The Federal Court Proceedings

On December 27, 1989, over nine months after instigating the proceedings in the state court, and after at least eleven hearings before that court, New Beckley filed this action against Petitioners, alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, in the United States District Court for the Southern District of West Virginia. In its federal complaint, New Beckley alleged that the International Union and various individuals violated RICO by engaging in substantially the same conduct as that addressed in the state court proceedings. Particularly, the RICO Complaint sought redress from injuries New Beckley allegedly sustained from the strike, enumerating as predicate acts numerous instances of violence, intimidation, threats, coercion, and destruction of property.

On February 20, 1990, the Defendants moved to dismiss or stay the RICO Complaint under, *inter alia*, the *Colorado River* doctrine in light of the ongoing parallel proceedings in the state court. On August 24, 1990, after considering briefs and oral argument, the district court granted the Defendants' motion to dismiss. App. at 8a. In the first instance, the district court determined that the state and federal actions were parallel. The court recognized that the parties were virtually identical and that the issues

involved were substantially similar. App. at 10a. In reaching this conclusion, the court specifically noted the overwhelming presence of state law issues in the federal case as well as the fact that both cases were aimed at seeking redress from the same alleged strike misconduct at New Beckley. App. at 10a. After determining that both actions were parallel, the district court then carefully applied the exceptional circumstances factors set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), and dismissed the case. App. at 10a-12a. In applying the relevant factors, the court determined that abstention would serve the interests of "wise judicial administration, conservation of judicial resources and comprehensive disposition of litigation." App. at 11a. The court then noted, *inter alia*, that the state court originally obtained jurisdiction over the parties'dispute, that the state court possessed concurrent jurisdiction over the RICO claims, and that state law predominated over federal law. App. at 10a-12a.

New Beckley appealed the district court's order and a divided panel of the Fourth Circuit reversed. App. at 1a.

The panel majority held that the district court abused its discretion in dismissing the case under the "abstention" doctrine enunciated in *Colorado River* in favor of the parallel proceedings in West Virginia state court. The majority determined that the state and federal cases involved different issues and law and as result were not parallel, and that no exceptional circumstances existed warranting abstention. App. at 6a-7a. The majority made this determination because the federal action alleged violations of RICO. App. at 7a.

Judge Sprouse dissented, stating that "...the state and federal actions involved in this appeal are substantially parallel, and I would hold that the district court in abstaining did not abuse its discretion." App. at 7a.

REASONS FOR GRANTING THE WRIT

This case presents two significant issues warranting this Court's review. Both issues involve the application of the "abstention" doctrine enunciated by the Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

The first issue concerns the determination of what constitutes a "parallel" state court proceeding to which a federal court may defer jurisdiction when exceptional circumstances warrant. As a threshold matter, the *Colorado River* doctrine requires the existence of "parallel" state and federal proceedings. In this case, the court of appeals' decision held that both the state and federal actions must assert identical claims and legal theories as well as seek identical relief before the finding of parallelism can be made. Such a ruling creates a new standard for determining "parallelism" that is overly restrictive and in direct conflict with the standards adopted by every other circuit court. Furthermore, the ruling below is at odds with the policy underlying the *Colorado River* doctrine, namely allowing federal trial courts to exercise their discretion when presented with an action that is substantially similar to, and duplicative of, a pending state court action. This Court must resolve this newly created schism within the circuits so as to assure uniform interpretation of the *Colorado River* doctrine.

The second issue is whether the mere presence of a civil RICO claim in a federal case automatically overrides any consideration of the "exceptional circumstances" factors provided in *Colorado River* and precludes abstention.

The ruling below posits that the mere presence of the civil RICO allegations in the federal court action automatically negates the presence of the exceptional circumstances warranting abstention. App. at 6a-7a. Such a conclusion is directly contrary to this Court's decision in *Tafflin v. Levitt*, 493 U.S. 455 (1990), which held that state courts are entirely competent to adjudicate RICO cases. Furthermore, by permitting the mere presence of a RICO claim to override all other factors favoring abstention, the opinion below substantially alters the balance of factors to be evaluated in determining whether exceptional circumstances exist.

I. THE *COLORADO RIVER* DOCTRINE

Since the beginning of the 1970's there has been a marked shift in the willingness of federal courts to undertake to litigate federal issues that arise out of, or relate to, ongoing parallel state court proceedings. *See, e.g., Penzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987) ("proper respect for the ability of state courts to resolve federal questions . . . mandates that the federal court stay its hand"); *accord, Juidice v. Vail*, 430 U.S. 327, 334-36 (1977) (comity compels "respect for state functions"); *Moore v. Sims*, 442 U.S. 415, 430 (1979) ("state courts are the principal expositors of state law"); *Trainor v. Hernandez*, 431 U.S. 434, 441, (1977) (basic notions of comity require deference to state court proceedings); *Younger v. Harris*, 401 U.S. 37, 44 (1971) (doctrine of abstention "avoid[s] a duplication of

legal proceedings . . . where a single suit would be adequate to protect the rights asserted").

The increasing refusal of this Court to permit such duplicate jurisdiction arises from three sources. First, the scope and breadth of ever increasing federal regulation makes federal law increasingly applicable to state and common law disputes. Second, given this increased applicability, along with the concurrent jurisdiction of state and federal courts over most federal claims, there is no reason for one set of courts to be preferred over another. *See, e.g., Yellow Freight System v. Donnelly*, 494 U.S. ___, 108 L.Ed.2d 834, 839-40 (1990) (state courts have inherent authority and are thus presumptively competent to adjudicate claims arising under federal labor law; consequently federal courts do not have exclusive jurisdiction over civil actions brought under Title VII). Indeed, this Court recently stated that there is no reason to deny to state courts jurisdiction to adjudicate RICO claims because they, in fact, have "greater expertise" in applying the state predicate acts. Moreover, this Court expressed that it has "full faith in the ability of state courts to handle the complexities of civil RICO actions." *Tafflin v. Levitt*, 493 U.S. 455, 465 (1990).

Third, the increasing reluctance of federal courts to second guess state courts has been animated by a recognition that such duplication is a profound waste of limited judicial resources and the resources of the parties. As this Court stated in *Colorado River*, duplicative litigation implicates wise judicial administration, depletes resources of the courts and undermines the principle encouraging comprehensive disposition of litigation. 424 U.S. at 817, 819-20. The *Colorado River* doctrine, like the related abstention doctrines,

has expanded to meet simple, common sense concerns about the nature of the judicial process.

In *Colorado River*, this Court established a doctrine that permits federal courts to refuse to exercise jurisdiction in certain situations and held that "in 'exceptional' circumstances a federal court may stay or dismiss an action solely because of the pendency of similar litigation in state courts." *Gulfstream Aerospace v. Mayacomas Corp.*, 485 U.S. 271, 273 (1988) (discussing the *Colorado River* doctrine). In addition, if a state court has jurisdiction, concurrent federal proceedings are likely to be duplicative and wasteful, generate additional litigation and present the clear risk of inconsistent disposition.[3] *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 567 (1983).

Although the Court recognized the "virtually unflagging obligation" to exercise federal jurisdiction, it has emphasized "that the decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis, a matter committed to the district court's discretion." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 664 (1983)[4]; *Moses H.*

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[3]In his concurring opinion in *Gulfstream*, Justice Scalia recognized the "right to be free of the obstruction of a parallel federal proceeding [...]" 485 U.S. at 291.

[4]The Court in *Will*, relying on *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942), stated that "[o]rdinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with orderly and comprehensive disposition of state court litigation should be avoided.' [citation omitted]. The decision in such circumstances is largely committed to the discretion of the district court."

Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 19 (1983); *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183-84 (1952)(wise judicial administration is entrusted to the discretion of experienced and disciplined trial judges).

In exercising its discretion, the trial court must first determine whether the state and federal actions are "parallel." Upon making such a determination, the court must then evaluate a number of factors, identified in *Colorado River*, and later explicated in *Moses H. Cone*, to establish whether "exceptional circumstances" exist. 424 U.S. at 818.[5]

II. CONTRARY TO THE DECISION BELOW, THE CIRCUITS UNIFORMLY AND CORRECTLY HOLD THAT A FINDING OF PARALLELISM DOES NOT REQUIRE EXACT IDENTITY OF CLAIMS AND ISSUES

In *Colorado River*, this Court did not address the threshold issue of what constitutes "parallelism". Likewise, the decision in *Moses H. Cone*, although refining the *Colorado River* doctrine, did not set forth a definition of "parallel". Nevertheless, the circuits that have addressed the issue have uniformly determined that exact parallelism is not required. *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989) ("exact parallelism does not exist, but it is not required); *Travelers Indemnity v. Madonna*, 914 F.2d 1364,

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Will, 437 U.S. at 664.

[5]In *Cone*, the Court reaffirmed the analysis enunciated in *Colorado River* and provided additional factors warranting review by a district court. 460 U.S. at 25-26.

1372 (9th Cir. 1990). *See also Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1288 (7th Cir. 1988) ("A 'suit is parallel when substantially the same parties are contemporaneously litigating substantially the same issues in another forum.'") *quoting Calvert Fire Insurance Co. v. American Mutual Reinsurance Co.*, 600 F.2d 1228, 1229 (7th Cir. 1979); *Telesco v. Telesco Fuel and Masons*, 765 F.2d 356, 362 (2d Cir. 1985) (cases parallel when "...the same cause of action, regardless of theory or pleadings, is asserted in both courts.").

Simply raising an alternative theory of recovery, which could have been, and still can be, raised in state court, is insufficient to differentiate the federal action from the state case.[6] *See Nakash v. Marciano*, 882 F.2d at 1416. *See also Goerner v. Barnes*, 730 F.Supp. 767, 770 (S.D. Tex. 1990)(simply because federal case alleged RICO violation did not change the fact that the proceedings were parallel for purposes of abstention); *Telesco v. Telesco Fuel and Masons*, 765 F.2d 356, 360 (2d. Cir. 1985); *P&P Marketing, Inc. v. Ditton*, 746 F.Supp. 1354 (N.D. Ill. 1990)(cases parallel for abstention purposes even though federal case alleged RICO violation); *Clements v. J.D. O'Brien Olds-Cadillac-0GMC, Inc.*, 744 F.Supp. 838 (N.D. Ill. 1990); *Kent County Memorial Hospital v. Balasco*, ___ F. Supp. ___, 1990 U.S.

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[6]Aside from the fact that the state court has jurisdiction to hear the RICO action, New Beckley's general claim for relief in the state court action encompasses any type of relief that the court deems appropriate. Obviously this can include the money damages sought in federal court. Moreover, West Virginia's rules of civil procedure are liberally construed to allow amendments to complaints. *See, e.g., Conner v. Conner*, 334 S.E.2d 650 (W.Va. 1985); W.Va. Rule Civ. P. 15.

Dist. LEXIS 1792 (D.R.I. 1990).[7] *See also Gordon v. Luksch*, 887 F.2d 496 (4th Cir. 1989) (No dispute that the state and federal actions were parallel despite fact that the state court action sought an injunction, an accounting, damages, dissolution of a partnership, and appointment of a receiver and the federal action merely sought contribution on a note).

In the instant case the majority created a new standard for determining "parallelism" that directly conflicts with the above-referenced cases, is unduly restrictive, and is inconsistent with the *Colorado River* doctrine. The court stated that "the parties in both actions are virtually identical, but the issues raised and remedies sought are not." App. at 6a. In reaching this determination, the court specifically noted that "New Beckley seeks compensation in federal court and equitable relief in state court." App. at 6a. Thus, the majority established a standard requiring both the state and federal cases to involve the exact same parties, legal claims, theories, issues, and seek the exact same remedy before the cases can be deemed parallel.

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[7]*See also Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 631-32 (11th Cir. 1984); *Berlitz Schools of Languages of America, Inc. v. Everest House*, 619 F.2d 211, 215 (2d Cir. 1980); *Roach v. Teamsters Local Union No. 688*, 595 F.2d 446 (8th Cir. 1979). Although these cases involve the application of the doctrine of *res judicata*, they are relevant here to show that merely changing the theory of recovery is insufficient to distinguish claims for purposes of claim preclusion. Therefore, it logically follows that merely changing the theory of recovery, as New Beckley has done in the instant case, does not suffice to distinguish the claims for purposes of determining whether the actions are parallel because parallelism requires only substantial identity of issues.

In this case, the proceedings before the state court arose from the labor dispute with New Beckley. Likewise, the RICO action arose from the same set of facts, concerned substantially the same issues, and involved virtually identical parties.[8] Both proceedings are aimed at redressing alleged unlawful violence, force, coercion, intimidation, and destruction of property. Of those alleged predicate acts enumerated in the RICO Complaint for which New Beckley could possibly recover (i.e. incidents where New Beckley was the alleged victim of the predicate acts), not one allegation mentions a type of conduct that was not raised in the state proceedings. Moreover, not only are the overall actions "substantially similar", but all three main sections of the RICO Complaint contain references to certain conduct that was specifically referred to in the state proceedings.[9] Therefore, the same dispute existed in both cases notwithstanding the theory of the cases.

Nevertheless, the majority of the panel ruled that, because the federal claim involved RICO, and expressly sought treble damages, it is not parallel to the state court action. App. at 6a. The logical extension of this standard is that abstention is never appropriate or warranted in an action brought under RICO. This, of course, is contrary to the Supreme Court's decision in *Tafflin v. Levitt*, 493 U.S. 455 (1990), which held that state courts are entirely competent to adjudicate RICO cases.

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[8]There is no dispute as to the similarity of the parties involved in the state and federal actions. App at 6a.

[9]Specific conduct that was expressly litigated in the state court proceedings was also enumerated in the RICO Complaint as predicate acts.

Moreover, this ruling is directly at odds with the policy supporting the *Colorado River* doctrine and the law of other circuits in that it posits that the legal theories *and* the relief sought must be identical in both forums before the proceedings can be deemed parallel.[10]

III. THE PRESENCE OF THE RICO CLAIM IN FEDERAL COURT CANNOT OVERRIDE THE EXCEPTIONAL CIRCUMSTANCES SUPPORTING ABSTENTION

The majority also posited that the mere existence of the RICO allegations in the federal court action eclipsed the presence of the exceptional circumstances warranting abstention. App. at 6a-7a. Such a ruling is directly contrary to this Court's decision in *Tafflin v. Levitt*, *supra*. If allowed to stand, the ruling below will establish a precedent whereby the inclusion of a RICO claim will override the presence of all other circumstances supporting abstention, and defeat the salutary purposes of abstention.

Once the trial court has established that the state and federal proceedings are parallel, it next must determine whether there are "exceptional circumstances" warranting abstention under the *Colorado River* doctrine. This Court has ruled that a myriad of factors are relevant to a determination

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[10]Furthermore, such a requirement would permit a state court plaintiff, unhappy with the progress of a garden variety lawsuit, to avoid a foreseen adverse decision, even after substantial progress, by simply molding the cause of action into the broad parameters of a RICO violation and filing a new lawsuit in federal court.

concerning exceptional circumstances. *Colorado River*, 424 U.S. at 818; *Cone*, 460 U.S. at 25-26. Specifically, the Court has noted that a trial court should consider the following factors in determining whether exceptional circumstances exist: (1) whether either court has jurisdiction over a res; (2) the relative convenience of the forums; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) the source of governing law, state or federal; and (6) the adequacy of the state court to protect the federal plaintiff's rights. Additionally, the presence or absence of concurrent jurisdiction is also relevant in balancing the factors. *Will v. Calvert Fire Ins. Co.*, 437 U.S. at 666; *Interstate Material Corp. v. City of Chicago*, 847 F.2d at 1288.

In considering these factors, no single factor is controlling, and the weight given to any factor will vary depending on the particularities of each case. *Colorado River*, 424 U.S. at 818; *Cone*, 460 U.S. at 16. Furthermore, the court should consider "special factors counseling for or against the exercise of jurisdiction." *Calvert Fire Ins. Co. v. American Mutual Reinsurance Co.*, 600 F.2d 1228, 1234 (7th Cir. 1979). Consistent with a court's duty to balance these factors properly, they should be "applied in a pragmatic flexible manner with a view to the realities of the case at hand." *Cone*, 460 U.S. at 16. Consequently, the decision whether to apply the *Colorado River* doctrine should not rest on a mechanical checklist, but is left to the sound discretion and judgment of the district judge. *Id.*

In *Tafflin*, *supra*, this Court unanimously determined that state courts have concurrent jurisdiction to hear civil claims under RICO. Justice O'Connor, writing for the Court in *Tafflin*, stated that there was no incompatibility between

state court jurisdiction over RICO actions and the important federal policies underlying RICO, and that permitting state courts to have jurisdiction serves to advance, rather than jeopardize, the enforcement of those federal policies. 493 U.S. at 467. Indeed, this Court recognized that many RICO cases, such as the present one, assert violations of state law over which state courts have greater expertise, and asserted its "full faith in the ability of state courts to handle the complexities of civil RICO action..." *Id.* at 465. Further elaborating on this point, Justice White wrote:

> RICO is an unusual federal criminal statute. It borrows heavily from state law; racketeering activity is defined in terms of numerus offenses chargeable under state law, as well as various federal offenses. [citations omitted]. To the extent that there is any danger under RICO of nonuniform construction of criminal statutes, it is quite likely that the damage will result from federal misunderstanding of the content of state law--a problem, to be sure, but not one to be solved by exclusive federal jurisdiction.

Id. at 468. (White, J., concurring).

Likewise, in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), the Fourth Circuit determined that state courts possess concurrent jurisdiction under RICO and upheld dismissal of a federal RICO action in favor of ongoing state court proceedings.[11]

Thus, in *Tafflin*, this Court agreed with the holding in *Brandenburg*, that RICO does not raise such complex issues of federal law that state court resolution is incompatible with federal interests. 859 F.2d at 1194-95. In this case, by determining that the RICO claims should be heard in federal court simply because RICO is a federal statute, the opinion below conflicts with both *Tafflin* and *Brandenburg*.

This case involves the precise type of situation contemplated by Justice White in *Tafflin*. In New Beckley's federal Complaint, 136 of the 179 alleged predicate acts involve violations of state law. In addition, New Beckley has attached two purely state law claims to its RICO claim under the doctrine of supplemental jurisdiction. Obviously, the federal court would be required to interpret and apply the controlling West Virginia authorities when considering both the predicate acts and pendent claims. These state law issues lie at the heart of the federal action.[12] In reality, the federal

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[11]Although the abstention in *Brandenburg* was based on the Supreme Court's decision in *Burford v. Sun Oil*, 319 U.S. 315 (1943), the court nevertheless unequivocally affirmed that state courts are entirely competent to decide RICO cases.

[12]In fact, this Court has repeatedly recognized that the resolution of the type of conduct alleged in this case is "deeply rooted in local feeling and responsibility." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). Allegations involving physical assaults, threats and

action merely places a RICO veneer on issues that are already before the state court. The only distinguishing question presented in the federal action is whether the Defendants are liable for treble damages for violations of state law.

Nevertheless, the ruling below requires the district court to address issues that have been, and should be, decided by the state court, simply because a RICO count is alleged in the federal action. Accordingly, in light of the overwhelming state law issues involved in this case, the Fourth Circuit's ruling is not only directly contrary to *Tafflin*, but it also impermissibly alters the balancing test required under *Colorado River* and its progeny by allowing the inclusion of a RICO allegation to nullify and override all other considerations warranting abstention.

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general public disorder are clear examples of areas traditionally left to local law. "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction." *U.A.W. v. Wisconsin Employment Relations Board*, 351 U.S. 266, 274-75 (1956). *See also United Constructions Workers v. Laburnum Construction Corp.*, 397 U.S. 656 (1954); *U.A.W. v. Russell*, 356 U.S. 634, 641-46 (1958).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: February 14, 1992

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NEW BECKLEY MINING CORPORATION,

Plaintiff-Appellant,

v. No. 90-1103

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; JOE CARTER; KEN PETERSON; VIRGIL PYATT; LARRY FLINT; HARVEY STOVER; ROBERT BURDETTE; PAUL DANIELS; GEORGE "TEX" BAILEY; HERMAN STANLEY; RONNIE SCARBRO; ROBERT "BUCK" TYREE; KEN TOLER; ROBERT MCKINNEY; JOHN DOES,

Defendants-Appelles,

Appeal from the United States District Court
for the Southern District of West Virginia, at Beckley.
Elizabeth V. Hallanan, District Judge.
(CA-89-1542-5)

Argued: March 6, 1991

Decided: October 16, 1991

Before SPROUSE, Circuit Judge, BUTZNER, Senior Circuit Judge, and DUPREE, Senior United States District Judge for the Eastern District of North Carolina, sitting by designation.

Reversed and remanded by published opinion, Senior Judge Butzner wrote the majority opinion, in which Senior Judge Dupree joined. Judge Spouse wrote a dissenting opinion.

COUNSEL

ARGUED: Mark Anthony Carter, SMITH, HEENAN & ALTHEN, Charleston, West Virginia, for Appellant, John Robert Mooney, BEINS, AXELROD, OSBORNE & MOONEY, P.C., Washington, D.C., for appellees. ON BRIEF: Forrest H. Roles, SMITH, HEENAN & ALTHEN, Charleston, West Virginia, for Appellant, Richard W. Gibson, BEINS, AXELROD, OSBORNE & MOONEY, P.C., Washington, D.C.; Earl V. Brown, Jr., George N. Davies, UNITED MINE WORKERS OF AMERICA, Washington, D.C.; James M. Haviland, MCINTYRE, HAVILAND & JORDAN, Charleston, West Virginia, for Appellees.

OPINION

BUTZNER, Senior Circuit Judge:

New Beckley Mining Corporation sued the United Mine Workers of America (UMWA) for injunctive relief in West Virginia state court charging violations of West Virginia laws, and it later filed a suit against the union in federal district court alleging violations of the Racketeer influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 and West Virginia law. Relying on *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), the district court ruled that because of the state suit it should abstain from hearing the federal action and dismissed the case. We reverse primarily because the issues in the state suit differ significantly from those in the federal action.

I

New Beckley, a coal mining company located in West Virginia, employed miners represented by the UMWA. Soon after the UMWA instituted a selective strike against New Beckley, the mining company sought an injunction in the Circuit Court of Raleigh County, West Virginia. Upon joint motion of the parties, the court granted a temporary injunction designed to limit violence and harassment by both sides, *New Beckley Mining Corp. v. Int'l Union, UMWA*, Civ. No. 89-C-215 (Mar. 28, 1989). The court subsequently conducted additional hearings and amended the injunction.

New Beckley sued the UMWA in the United States District Court for the Southern District of West Virginia, alleging violations of RICO and West Virginia law governing interference with business relations and malicious destruction of property. New Beckley's federal complaint enumerated instances of strike-related violence and destruction of property as predicate acts and sought damages for injuries

New Beckley allegedly sustained as a result. In view of the pending litigation in the state court, the UMWA moved to dismiss the RICO action, asserting that the federal court should abstain.

After finding that the state and federal proceedings were substantially similar, the district court evaluated both actions in light of *Colorado River*, 424 U.S. 800, and *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). The district court decided that the state and federal proceedings were parallel because both "arose from and relate to" the selective strike, both "seek to curb and eliminate unlawful violence," and "both...concern violations of West Virginia law." *New Beckley Mining Corp. v. Int'l Union, UMWA*, Civ. No.5:89-1542, slip op. at 2(S.D.W.Va. Aug. 24, 1990). The court then considered the factors mentioned in *Colorado River* and *Moses H. Cone*, and concluded that it should surrender jurisdiction in favor of the state proceedings.

II

A district court has a duty to adjudicate a controversy properly before it: "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River*, 424 U.S. at 813. The Court, however, has recognized that under exceptional circumstances a district court may abstain "for reasons of wise judicial administration." 424 U.S. at 817-18. When a litigant urges abstention on the ground that concurrent federal and state suits present exceptional circumstances, the district court must first determine whether the state and federal proceedings are parallel. Suits are parallel if substantially the same parties litigate substantially the same issues in different forums. *LaDuke v. Burlington*

N.R.R., 879 F.2d 1556, 1559 (7th Cir. 1989). Because federal courts have a "virtually unflagging obligation...to exercise the jurisdiction given them," *Colorado River*, 424 U.S. at 817, the existence of proceedings in state court does not by itself preclude parallel proceedings in federal court. 424 U.S. at 818. The court must consider factors identified in *Colorado River* and *Moses H. Cone* to establish whether "exceptional circumstances" exist. The factors to be considered include the following: (a) the assumption by either court of jurisdiction over property; (b) the inconvenience of the federal forum; (c) the desire to avoid piecemeal litigation; (d) the applicable law. *Moses H. Cone*, 460 U.S. at 15-16, 23; *Colorado River*, 424 U.S. at 818. The Supreme Court has cautioned that "the decision whether to dismiss a federal action because of parallel state court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone*, 460 U.S. at 16.

We have emphasized that "[o]nly in the most extraordinary circumstances...may federal courts abstain from exercising jurisdiction in order to avoid piecemeal litigation." *Gordon v. Luksch*, 887 F.2d 496, 497 (4th Cir. 1989). Similarly, other circuits have reversed district courts that failed to accord sufficient weight "to the heavy presumption favoring the exercise of jurisdiction." *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7, 13 (1st Cir. 1990); *see also American Bankers Inc. Co. v. First State Ins. Co.*, 891 F.2d 882, 885 (11th Cir. 1990); *Bethlehem Contracting Co. v. Lehrer/McGovern, Inc.*, 800 F.2d 325, 327 (2d Cir. 1986).

III

We review the district court's decision to surrender jurisdiction for abuse of discretion. The district court must nevertheless exercise its discretion in accordance with the *Colorado River* "exceptional circumstances test." *Moses H. Cone*, 460 U.S. at 19.

The parties in both actions are virtually identical, but the issues raised and remedies sought are not. New Beckley seeks compensation in federal court and equitable relief in state court. A difference in remedies is a factor counseling denial of a motion to abstain. *See A Pocono Country Place, Inc. v. Peterson*, 675 F.Supp 968, 972 (M.D.Pa. 1987). The difference in remedies becomes more pronounced when one suit requires a jury and the other does not, and pleadings would require substantial amendment if the district abstained. The order in which the courts obtained jurisdiction matters little, since New beckley filed the suits in March and December of the same year.

Although both actions allege the UMWA's responsibility for specific violent incidents associated with the selective strike, some factual overlap does not dictate that proceedings are parallel; "[T]he *Colorado River* doctrine does not give federal courts *carte blanche* to decline to hear cases within their jurisdiction merely because issues or factual disputes in those cases may be addressed in past or pending proceedings before state tribunals." *United States v. SCM Corp.*, 615 F.Supp 411, 417 (D.Md. 1985).

While both suits involve alleged violations of West Virginia criminal law, the federal action alleges predicate acts that violate the criminal laws of Kentucky and Virginia as

well. The source of law factor militates in favor of retention of jurisdiction, since federal law provides the rule of decision on the merits of the RICO claim. *See Moses H. Cone*, 460 U.S. at 23-26. The district court accorded significant weight to the fact that state and federal courts have concurrent jurisdiction over civil RICO claims. *See Tafflin v. Levitt*, 493 U.S. 455, ___, 110 S. Ct. 792, 799 (1990). While concurrent subject matter jurisdiction renders the source of law factor less important, *see Moses H. Cone* 460 U.S. at 25, it does not mandate that the district court surrender jurisdiction. *See A Pocono Country Place, Inc.*, 675 F.Supp. at 972.

Because the issues in the two cases differ, and consequently the sources of law differ, the UMWA has not shown exceptional circumstances justifying abstention from the exercise of federal jurisdiction. The judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

SPROUSE, Circuit Judge, dissenting:

I respectfully dissent. In my view, the state and federal actions involved in this appeal are substantially parallel, and I would hold that the district court in abstaining did not abuse its discretion.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

NEW BECKLEY MINING CORPORATION,

Plaintiff,

v. Civil Action No. 5:89-1542

INTERNATIONAL UNION, UNITED
MINE WORKERS OF AMERICA;
JOE CARTER; KEN PETERSON;
VIRGIL PYATT; LARRY FLINT;
HARVEY STOVER; ROBERT
BURDETTE; PAUL DANIELS;
GEORGE "TEX" BAILEY;
HERMAN STANLEY; RONNIE
SCARBRO; ROBERT "BUCK" TYREE;
KEN TOLER; ROBERT MCKINNEY;
AND JOHN DOES,

Defendants.

ORDER

This matter is before the Court via Defendants' Motion to Dismiss on abstention grounds. Having heard the oral arguments of counsel on August 24, 1990 and carefully

reviewed the papers submitted, the Court is prepared to rule on said motion.

In this action, Plaintiff filed a complaint in the Circuit Court of Raleigh County, West Virginia on March 21, 1989 seeking injunctive relief against the Defendants for acts of violence, intimidation, and coercion in connection with an economic strike by the Defendants that began on January 23, 1989. Later on December 27, 1989 Plaintiff filed a complaint with this Court charging Defendants with violating the Racketeer influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO") as well as violations of West Virginia law governing interference with business relations and malicious destruction of property.

Defendants have moved for dismissal of Plaintiff's civil RICO complaint and maintain that the state court action and federal court action arise from the same nucleus of operative facts. Additionally, Defendants aver that the two causes of action are parallel causes of action under the doctrine of abstention set forth in *Colorado River Water District v. United States*, 424 U.S. 800 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). Plaintiff, however, maintains that these causes of action markedly differ in substance and thus do not fall within the confines of *Colorado River* abstention analysis.

To properly apply *Colorado River* abstention analysis to the instant action, this Court must find the state court action in Raleigh County, West Virginia and the federal RICO action before it to constitute parallel proceedings. For state court and federal court actions to be parallel, the actions need not be identical. Instead, it is enough that the two proceedings are "substantially similar." *Nakash v. Marciano*,

882 F.2d 1411, 1416 (9th Cir. 1989). The Court finds that the two proceedings are in fact substantially similar. Both complaints arose from and relate to the economic strike commenced on January 23, 1989. In addition, the state and federal proceedings seek to curb and eliminate unlawful violence. Moreover, both complaints concern violations of West Virginia law. Accordingly, the Court finds that the two proceedings are parallel within the parameters of *Colorado River* abstention analysis.

We now turn to *Colorado River* and *Cone* to determine if this court should abstain from asserting jurisdiction in the instant case. The Court finds that the federal RICO action does not fall within any of the three categories of abstention outlined in *Colorado River*. *Colorado River*, 424 U.S. at 813-817. However, our inquiry does not end here. The Supreme Court directs this Court to consider dismissal of Plaintiff's civil RICO claim for there is a contemporaneous exercise of concurrent jurisdictions in Raleigh County, West Virginia and in the Southern District of West Virginia. *Id* at 817.

Colorado River and *Cone* provide six factors to be carefully balanced in determining whether to dismiss a federal action that parallels a state action. These factors are not exclusive and the weight given to one factor may differ from the weight given to another. *See Cone*, 460 U.S. at 16. The factors include (1) whether either court has jurisdiction over a res, (2) the relative convenience of the forums, (3) the desirability of avoiding piecemeal litigation, (4) the order in which the forums obtained jurisdiction, (5) whether state or federal law controls, and (6) whether the state proceeding is adequate to protect the parties' rights. *Nakash*, 882 F.2d at 1415.

The Court finds the first two factors are not critical to merit special attention as there is no res at issue in this case and both the Circuit Court for Raleigh County and the U.S. District Court in Beckley, West Virginia are equally convenient to the parties and the New Beckley mine. Yet, the remaining four factors merit some discussion.

The Court seeks to avoid piecemeal litigation in this action in the interests wise judicial administration, conservation of judicial resources and comprehensive disposition of litigation. Asserting jurisdiction over this case would not serve to achieve this end. Furthermore, the Court finds critical that the Circuit Court of Raleigh County originally obtained jurisdiction over the instant litigation in light of *Tafflin v. Levitt*, 58 U.S.L.W. 4157 (U.S. January 22, 1990) (No. 88-1650) in which the Supreme Court held that state courts have concurrent jurisdiction over civil RICO claims. Under *Tafflin*, state courts may address civil RICO claims as the highest Court found no clear incompatibility between state court jurisdiction over civil RICO claims and federal interests in RICO. Moreover, the Court in its decision expressed its strong faith in state courts and their ability to handle the complexities of civil RICO actions, given the fact that many RICO cases involve asserted violations of state law over which state courts presumably have greater expertise. 58 U.S.L.W. at 4160. State law offenses constitute the predicate acts necessary for a RICO violation as evidenced by 18 U.S.C. §1961 (1)(A). Thus, for purposes of *Colorado River* abstention analysis, state law predominates over federal law in this case.

In the wake of *Colorado River*, *Cone* and *Tafflin*, the Court finds that state court is the appropriate forum for Plaintiff's civil RICO complaint. The Circuit Court of

Raleigh County, now with jurisdiction over civil RICO matters and equipped with expertise in dealing with violations of West Virginia law, may adjudicate Plaintiff's RICO claim without prejudice to said party. Accordingly, Defendants' Motion to Dismiss on abstention grounds is ORDERED GRANTED without prejudice pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Court relies on the fact that counsel for the defendants stipulated on the record when before the Court on August 24, 1990 that Defendants would proceed in the Circuit Court for Raleigh county in good faith and without any objection, procedural or otherwise, in the event this Court granted said motion. It is further ORDERED that all pending discovery motions in this matter are rendered moot inasmuch Defendants' motion has been granted.

The Clerk is directed to send copies of this Order to all counsel of record.

IT IS SO ORDERED this 24th day of August, 1990.

ENTER:

Elizabeth V. Hallahan
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 19, 1991

NEW BECKLEY MINING CORPORATION,

Plaintiff-Appellant

v. No. 90-1103
CA-89-1542-5

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; JOE CARTER; KEN PETERSON; VIRGIL PYATT; LARRY FLINT; HARVEY STOVER; ROBERT BURDETTE; PAUL DANIELS; GEORGE "TEX" BAILEY; HERMAN STANLEY; RONNIE SCARBRO; ROBERT "BUCK" TYREE; KEN TOLER; ROBERT MCKINNEY; AND JOHN DOES,

Defendants-Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellant filed a petition for rehearing with suggestion for rehearing in banc. Judge Sprouse voted to grant panel rehearing. Judges Butzner and Dupree voted to deny. No

member of the Court requested a poll on the suggestion for rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

For the Court,
John M. Greacen
CLERK